A

Pam Bin Yeek (Village Chairman for Tasik Asal Cunex Hulu Air Denlak, suing on behalf of himself and 127 others as listed in 'Lampiran A') v Kerajaan Negeri Perak & Ors

B

HIGH COURT (TAIPING) — CIVIL SUIT NO AB-21NCVC-4–06 OF 2019
NOOR RUWENA JC
C 24 OCTOBER 2024

Land Law — Native customary right — Land dispute — Customary rights over land — Aboriginal peoples right over land — Trespass by third part due to logging D *— Whether the plaintiffs were entitled to the land and the forest products — Whether state authorities were tasked with the responsibility to protect the rights and interests of the plaintiffs in respect of the alleged customary land rights — Whether state authorities had breached any duties by not gazetting the land and allowing private company to carry on logging activities in the land* E *— Whether collectively the defendants had trespassed onto and violated the plaintiffs' customary land rights and liable for the plaintiffs' claims*

The plaintiff's claim against the first to fourth defendants as State Government, the District Officer of Hulu Perak, the State's Director of Land and Mineral F and the State's Director of the Forestry Department respectively were for the alleged breaches of fiduciary duty. Whereas the claim against the fifth defendant, a private company that was granted license to carry on logging activities in the disputed area at the material time was in respect of alleged intentional trespass. The alleged land was claimed as being their customary G land or tanah adat located at Kampung Asal Tasik Cunex Hulu Denlak, situated in Kawasan Hutan Simpan Air Cepam, Mukim Gerik, Daerah Hulu Perak ('the land'). The dispute arose because some parts of the land alleged to be the plaintiff and his tribe's roaming area had been encroached upon by fifth defendant's servants and/agents. The plaintiffs contended that the first to H fourth defendants owed fiduciary duties to the plaintiffs as natives to protect, preserve and safeguard the common law rights of the plaintiffs over the land. Therefore, the plaintiffs contended that the first to fourth defendants had collectively breached their fiduciary duties in allowing fifth defendant to carry out logging activities on the land. It was further contended that the defendants I had violated their rights as guaranteed under the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') adopted by the UN General Assembly on 13 September 2007. The plaintiffs claimed for certain declarations and general, aggravated and exemplary damages to be given to them for the various breaches of their rights and interests. The issues for

determination were: (a) whether the plaintiffs were entitled to the land and the forest products; (b) whether first to fourth defendants were tasked with the responsibility to protect the rights and interests of the plaintiffs in respect of the alleged customary land rights; (c) whether first to fourth defendants had breached any duties by not *gazetting* the land and allowing fifth defendant to carry on logging activities in the land; and (d) whether collectively the defendants had trespassed onto and violated the plaintiffs' customary land rights and therefore, liable for the plaintiffs' claims in this suit.

Held:

(1) The court made a finding of fact that the plaintiffs had customary community title to the land by virtue of their continuous occupation of the land since time immemorial, from the time of their ancestors. However, regard must also be had to the views of our appellate court judges that there must be some demarcation of the land as they cannot claim all areas that they had been planting, foraging and hunting in the past. The correct position of law regarding the size and boundary of the customary land which may be claimed by the Orang Asli was confined and limited only to the area that forms their settlement but not to the jungle at large where they used to roam and to forage for their livelihood in accordance with their custom and tradition (see paras 51–52).

(2) It was noted that the law provides that at the state level, the power to control land and natural resources are entrusted to the respective PBN. One of these duties was to declare areas to be occupied by the Orang Asli to the exclusion of others (upon application by JAKOA). Additionally, in Peninsular Malaysia, the National Forestry Act 1984 ('the NFA'), the National Land Code ('the NLC'), the National Parks Act 1980 ('the NPA') and Malay reservation legislation for each of the states govern the areas of land, forestry, wildlife and protected areas, respectively. Among the provisions of these laws were for the reservation of land for different purposes, such as gaming reserve, environmental conservation, reserve for the protection of the Malays, and other reserves. Section 10(1) of the APA specifically provides that the Orang Asli may continue to live within the reservation regardless of contrary provisions in the relevant legislation. Thus, the first to fourth defendants were tasked with the responsibility to protect the rights and interests of the plaintiffs in respect of the alleged customary land rights (see paras 58 & 60).

(3) It was the court's finding that first to fourth defendants had not breached their fiduciary duties for not *gazetting* the yet to be *gazetted* land at the material time when the approval for fifth defendant to carry out logging activities was granted in 2017. Here, the State Authority had already allocated a parcel of land and *gazetted* it as an OAR when RPS Dala was established. Moreover, the plaintiffs had moved to another settlement

which was not very far from RPS Dala. If there had been an application made by the plaintiffs, it would have been a different consideration by the court. SP3 stated that he informed JAKOA about the move via letter dated 11 October 2018 although they had allegedly left RPS Dala in 2016. This meant that JAKOA was only notified in 2018 whereas the application for a logging approval was done in late 2016 and approved in January 2017 (see para 67).

(4) Having considered the evidence on both sides in regard to this issue, the court concluded that there was no trespass committed by fifth defendant or any of the other defendants as the facts did not support it, despite the court finding that the plaintiffs had customary rights on the land. Moreover, the logging sites where fifth defendant worked to extract the timber were eight kilometres away from the plaintiffs' settlement. Hence, the court moulded the reliefs to ensure that the orders were reflective of the situation, as had been determined after a full trial. The court did not allow the declarations sought because the situation did not warrant it (see para 75).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan pertama hingga keempat sebagai Kerajaan Negeri, Pegawai Daerah Hulu Perak, Pengarah Tanah dan Galian Negeri dan Pengarah Jabatan Perhutanan Negeri masing-masing adalah atas dakwaan pelanggaran kewajipan fidusiari. Manakala tuntutan terhadap defendan kelima, sebuah syarikat swasta yang diberikan lesen untuk menjalankan aktiviti pembalakan di kawasan yang dipertikaikan pada masa material adalah berkenaan dengan dakwaan pencerobohan yang disengajakan. Tanah yang dipertikaikan adalah didakwa tanah adat bertempat di Kampung Asal Tasik Cunex Hulu Denlak, terletak dalam Kawasan Hutan Simpan Air Cepam, Mukim Gerik, Daerah Hulu Perak ('tanah tersebut'). Pertikaian itu timbul kerana beberapa bahagian tanah yang didakwa sebagai kawasan penerokaan plaintif dan puaknya telah diceroboh oleh pekerja dan/ejen defendan kelima. Plaintif berpendapat bahawa defendan pertama hingga keempat mempunyai kewajipan fidusiari kepada plaintif sebagai masyarakat asli untuk melindungi, memelihara dan melindungi hak 'common law' plaintif ke atas tanah tersebut. Oleh itu, plaintif berpendapat bahawa defendan pertama hingga keempat telah secara kolektif melanggar kewajipan fidusiari mereka dalam membenarkan defendan kelima menjalankan aktiviti pembalakan di atas tanah tersebut. Ianya selanjutnya dinyatakan bahawa defendan telah melanggar hak mereka seperti yang dijamin di bawah Deklarasi Pertubuhan Bangsa-Bangsa Bersatu Mengenai Hak Orang Asal (UNDRIP) yang diterimapakai oleh Perhimpunan Agung PBB pada 13 September 2007. Plaintif menuntut pengisytiharan tertentu dan ganti rugi am, teruk dan teladan yang akan diberikan kepada mereka atas pelbagai pelanggaran hak dan kepentingan mereka. Isu untuk penentuan adalah: (a) sama ada plaintif berhak

ke atas tanah dan hasil hutan; (b) sama ada defendan pertama hingga keempat telah ditugaskan dengan tanggungjawab untuk melindungi hak dan kepentingan plaintif berkenaan dengan hak tanah adat yang dikatakan; (c) sama ada defendan pertama hingga keempat telah melanggar mana-mana kewajipan dengan tidak mewartakan tanah itu dan membenarkan defendan kelima menjalankan aktiviti pembalakan di tanah itu; dan (d) sama ada secara kolektif defendan telah menceroboh dan melanggar hak tanah adat plaintif dan oleh itu, bertanggungjawab ke atas tuntutan plaintif dalam guaman ini.

Diputuskan:

(1) Mahkamah membuat dapatan fakta bahawa plaintif mempunyai hak milik masyarakat adat ke atas tanah itu berdasarkan pendudukan berterusan tanah itu sejak zaman berzaman, dari zaman nenek moyang mereka. Walau bagaimanapun, pandangan hakim mahkamah rayuan juga mesti diambil kira bahawa mesti ada persempadanan semula tanah kerana mereka tidak boleh menuntut semua kawasan yang mereka telah tanam, mencari makan dan memburu pada masa lalu. Kedudukan undang-undang yang betul mengenai saiz dan sempadan tanah adat yang boleh dituntut oleh Orang Asli adalah terhad hanya kepada kawasan yang menjadi penempatan mereka tetapi tidak di kawasan hutan secara meluas tempat mereka merayau dan mencari rezeki mengikut adat dan tradisi mereka (lihat perenggan 51–52).

(2) Ianya dinyatakan bahawa undang-undang memperuntukkan bahawa di peringkat negeri, kuasa mengawal tanah dan sumber asli diamanahkan kepada PBN masing-masing. Salah satu tugas ini adalah mengisytiharkan kawasan yang akan diduduki oleh Orang Asli dengan mengecualikan orang lain (atas permohonan oleh JAKOA). Selain itu, di Semenanjung Malaysia, Akta Perhutanan Negara 1984 ('APN'), Kanun Tanah Negara ('KTN'), Akta Taman Negara 1980 ('NPA') dan perundangan kawasan simpan Melayu bagi setiap negeri mengawal kawasan tanah, perhutanan, hidupan liar dan kawasan perlindungan, masing-masing. Antara peruntukan undang-undang ini adalah untuk simpanan tanah untuk tujuan yang berbeza, seperti rizab perjudian, pemuliharaan alam sekitar, rizab untuk perlindungan orang Melayu, dan rizab lain. Seksyen 10(1) APA secara khusus memperuntukkan bahawa Orang Asli boleh terus tinggal dalam reservasi tanpa mengira peruntukan bertentangan dalam perundangan yang berkaitan. Oleh itu, defendan pertama hingga keempat ditugaskan dengan tanggungjawab untuk melindungi hak dan kepentingan plaintif berkenaan dengan hak tanah adat yang didakwa (lihat perenggan 58 & 60).

(3) Ia adalah dapatan mahkamah bahawa defendan pertama hingga keempat tidak melanggar kewajipan fidusiari mereka kerana tidak mewartakan tanah yang belum diwartakan pada masa material apabila kelulusan

defendan kelima untuk menjalankan aktiviti pembalakan telah diberikan pada tahun 2017. Di sini, Pihak Berkuasa Negeri telah pun memperuntukkan sekeping tanah dan mewartakannya sebagai OAR apabila RPS Dala ditubudkna. Selain itu, plaintif telah berpindah ke penempatan lain yang tidak begitu jauh dari RPS Dala. Sekiranya terdapat permohonan yang dibuat oleh plaintif, ia akan menjadi pertimbangan yang berbeza oleh mahkamah. SP3 menyatakan bahawa beliau telah memaklumkan kepada JAKOA mengenai perpindahan itu melalui surat bertarikh 11 Oktober 2018 walaupun mereka didakwa telah meninggalkan RPS Dala pada 2016. Ini bermakna JAKOA hanya dimaklumkan pada 2018 sedangkan permohonan kelulusan pembalakan dibuat pada akhir 2016 dan diluluskan pada Januari 2017 (lihat perenggan 67).

(4) Setelah mempertimbangkan keterangan kedua-dua belah pihak berhubung isu ini, mahkamah membuat kesimpulan bahawa tidak ada pencerobohan yang dilakukan oleh defendan kelima atau mana-mana defendan lain kerana fakta tidak menyokongnya, walaupun mahkamah mendapati bahawa plaintif mempunyai hak adat ke atas tanah itu. Selain itu, tapak pembalakan di mana defendan kelima bekerja untuk mengeluarkan kayu itu adalah lapan kilometer dari penempatan plaintif. Oleh itu, mahkamah membentuk relif untuk memastikan bahawa perintah itu mencerminkan keadaan, seperti yang telah ditentukan selepas perbicaraan penuh. Mahkamah tidak membenarkan pengisytiharan yang diminta kerana keadaan tidak membenarkannya (lihat perenggan 75).]

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor (No 2) [1997] 5 MLJ 432; [1998] 2 CLJ 665, HC (refd)

Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals [2022] 2 MLJ 273; [2022] 3 CLJ 1, FC (refd)

Calder v Attorney-General of British Columbia [1973] 34 DLR (3d) 145, CA (refd)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (refd)

Eddy bin Salim & Ors v Iskandar Regional Development Authority & Ors [2017] MLJU 2308; [2017] MLRHU 1793, HC (refd)

Goh Bak Ming v Yeoh Eng Kong and other appeals [2018] MLJU 1133; [2019] 1 CLJ 461, CA (refd)

Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli & Anor v Mohamad bin

Nohing (Batin Kampung Bukit Rok) & Ors and another appeal [2015] 6 MLJ 527, CA (refd)
Kong Chee Wai dan satu lagi lwn Pengarah Tanah dan Galian Perak dan lain-lain dan satu kes lagi [2015] MLJU 121; [2016] 1 CLJ 605, HC (refd)
Mabo and Others v State of Queensland and another (1986) 64 ALR 1, HC (refd)
North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi [2018] supp MLJ 293; [2011] 4 CLJ 729, FC (refd)
Public Prosecutor v Kenneth Fook Mun Lee (No 1) [2002] 2 MLJ 563; [2001] 3 MLRH 798, HC (distd)
Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591, HC (distd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256, CA (refd)

Legislation referred to

Aboriginal Peoples Act 1954 ss 7(2)(iii), 10(1)
Enakmen Akta Perhutanan Negara 1984
Federal Constitution art 74(1), Ninth Schedule, List I, item 16
Land Acquisition Act 1960
National Land Code ss 4, 4(2), 425
National Forestry Act 1984
National Parks Act 1980
Rules of Court 2012 O 40A r 3

G Nadaraja (with R Hanita a/p Ramachandran) (R Hanita & Assoc) for the plaintiff.
Sharifah Izura bt Syed Mansor (Federal Counsel, Perak State Legal Advisor's Office) for the first, second, third and fourth defendants.
Mohd Fitri bin Asmuni (with Nur Adnen bt Yahya) (Awi & Co) for the fifth defendant.

Noor Ruwena JC:

INTRODUCTION

[1] The parties in this suit will be referred to as they were at the High Court. The case concerned the claims of a group of Orang Asli (as they are known in the Peninsular Malaysia), particularly from the Temiar tribe. The plaintiff, Pam Bin Yeek, of Kg Tasik Asal Cunex Hulu Denlak, Perak commenced the legal action on behalf of himself and another 127 members of the said village against the defendants on 3 June 2019. For the purpose of the appeal they will be

A referred to as 'the plaintiff' or collectively as 'the plaintiffs'.

[2] The first to fourth defendants were the State Government, the District Officer of Hulu Perak, the State's Director of Land and Mineral and the State's Director of the Forestry Department, respectively. The fifth defendant was a private company that was granted license to carry on logging activities in the disputed area at the material time.

[3] Briefly, among the plaintiff's claim against the first to fourth defendants were for the alleged breaches of fiduciary duty. Whereas the claim against the fifth defendant was in respect of alleged intentional trespass and more as stated in the plaintiff's statement of claim pertaining to what they claim as being their customary land or *tanah adat* located at Kampung Asal Tasik Cunex Hulu Denlak, situated in Kawasan Hutan Simpan Air Cepam, Mukim Gerik, Daerah Hulu Perak ('the land').

[4] The trial commenced on 10 April 2023 and the court reserved judgment after hearing submissions of the parties on 21 March 2024. On 7 May 2024, the court delivered its judgment and allowed part of the plaintiff's claims with no order as to costs as follows:

i. deklarasi bahawa Plaintif adalah pemegang hakmilik adat dan/atau kelompok komuniti dan/atau pemegang-pemegang hak penggunaan tanah adat Plaintif iaitu setakat had penempatan selepas berpindah keluar dari RPS Dala;

ii. defendan Kedua hendaklah mengambil tindakan susulan untuk tanah adat seperti di perenggan (i) dikenal pasti iaitu pengukuran sempadan dalam tempoh 6 bulan dari tarikh perintah ini dan pewartaan sebagai kawasan Orang Asli atau rizab di bawah Akta Orang Asli 1964 dan sebarang kos ditanggung oleh jabatan yang berkenaan;

iii. deklarasi bahawa tanah adat Plaintif tersebut yang telah dikenal pasti tidak boleh dijalankan aktiviti pembalakan atau apa-apa aktiviti perhutanan yang boleh menjejaskan kehidupan Plaintif; dan

iv. tiada perintah mengenai kos.

[5] Dissatisfied with the court's decision, the first to fourth defendants have filed a notice of appeal on 29 May 2024. This grounds of judgment contains the court's reasons for the decision abovesaid.

THE TRIAL

[6] In this suit, the plaintiff sought the following reliefs from the court:

(a) Suatu deklarasi bahawa Plaintif dan nenek-moyang mereka adalah berhak kepada perlindungan hak terhadap Tanah tersebut menurut adat dan undang-undang;

(b) Suatu deklarasi bahawa Plaintif adalah pemegang-pemegang hakmilik adat dan/atau kelompok/komuniti dan/atau pemegang-pemegang hak penggunaan Tanah tersebut;

(c) Suatu perintah bahawa Tanah tersebut diwartakan Tanah adat Plaintif dan/atau tanah nenek moyang dan/atau rizab yang dihuni secara sah oleh Plaintif;

(d) Suatu deklarasi bahawa Defendan Pertama hingga Defendan Keempat dan ejen-ejennya tidak mempunyai hak di sisi undang-undang untuk mengurangkan, menyekatkan, merosakkan dan/atau memusnahkan keempunyaan, hakmilik, hak-hak Plaintif terhadap Tanah tersebut dengan menjalankan atau membenarkan pelaksanaan aktiviti-aktiviti yang telah dikenal pasti dan diperincikan dalam Penyataan Tuntutan ini;

(e) Suatu deklarasi bahawa pengeluaran lesen dan/atau kebenaran terhadap Tanah tersebut kepada Defendan Kelima atau mana-mana syarikat pembalakan yang lain dikenal pasti kelak adalah bertentangan dengan undang-undang dan ianya tidak sah serta terbatal;

(f) Suatu deklarasi bahawa Defendan Pertama hingga Defendan Keempat dan/atau mana-mana antara mereka telah gagal untuk melaksanakan tugas dan tanggungjawab fidusiari sebagaimana di dalam Perlembagaan Persekutuan dan/atau undang-undang bertulis yang berkaitan termasuk Akta 134 dan/atau prinsip undang-undang lazim (common law) dan/atau duluan kehakiman (judicial precedents);

(g) Suatu deklarasi bahawa Defendan Pertama hingga Defendan Keempat telah bertindak bertentangan dengan prinsip keadilan asasi jangkaan sah yang munasabah oleh Plaintif;

(h) Suatu deklarasi bahawa Defendan Pertama hingga Defendan Keempat dan/atau mana-mana antara mereka untuk mengambil tindakan yang diperlukan untuk menjalankan pengukuran bagi memastikan sempadan yang tepat bagi tanah adat Plaintif. Kos untuk pengukuran tersebut hendaklah ditanggung oleh Defendan Pertama;

(i) Deklarasi bahawa Defendan Pertama hingga Defendan Keempat dan/atau mana-mana antara mereka adalah bertanggungjawab dan diarahkan untuk mengambil langkah-langkah yang diperlukan untuk mewartakan Tanah tersebut sebagai kawasan Orang Asli atau rizab Plaintif di bawah Akta 134;

(j) Perintah bahawa tindakan Defendan Keempat dan/atau mana-mana daripada mereka dan/atau Defendan Kelima dan/atau mana-mana syarikat pembalakan yang lain dikenal pasti kelak yang memasuki Tanah tersebut adalah suatu tindakan pencerobohan;

(k) Suatu deklarasi bahawa Plaintif adalah berhak untuk gantirugi yang mencukupi daripada Defendan Pertama hingga Defendan Kelima atau mana-mana daripada mereka dan/atau mana-mana syarikat pembalakan yang lain dikenal pasti kelak kerana memusnahkan, menghalang, merosakkan dan/atau melupuskan keempunyaan, hakmilik dan hak-hak Plaintif terhadap Tanah tersebut;

(l) Perintah bahawa Defendan Pertama hingga Defendan Kelima dan/atau manamana antara mereka dan/atau mana-mana syarikat pembalakan yang lain dikenal pasti kelak dan/atau mana-mana antara mereka untuk membayar ganti rugi kepada Plaintif terhadap pencerobohan dan kerosakan yang dilakukan ke atas Tanah tersebut sebagaimana ditaksirkan oleh Mahkamah Yang Mulia;

(m) Injunksi Interlokutori dan Muktamad untuk menghalang Defendan keempat atau mana-mana pihak dan/atau individu dan/atau mana-mana syarikat-syarikat daripada menjalankan pembalakan atau apa-apa aktiviti komersial untuk keuntungan dan apa-apa perniagaan di atas Tanah tersebut;

(n) Dalam keadaan di mana Mahkamah Yang Mulia ini mendapati hak-hak Plaintif dihapuskan atau dirampas secara tidak menurut undang-undang, satu Deklarasi bahawa Defendan Pertama hendaklah memberikan pampasan yang mencukupi (adequate compensation) kepada Plaintif menurut Perkara 13 Perlembagaan Persekutuan dan/atau Akta 486 untuk ditaksirkan;

(o) Ganti rugi am, ganti rugi teruk dan ganti rugi teladan bagi pelanggaran hak-hak Plaintif termasuk hak-hak adat berhubung dengan Tanah tersebut;

(p) Kos prosiding ini; dan

(q) Lain-lain relief yang dianggap adil, sesuai dan munasabah oleh Mahkamah Yang Mulia ini.

[7] During trial, bundles of documents referred to were as follows:

(a) Bundle of Pleadings (BOP);

(b) Common Bundle of Documents (CBOD1);

(c) Additional Common Bundle of Documents (CBOD2);

(d) plaintiff's Additional Bundle of Documents (PBOD);

(e) first-fourth defendants' Additional Bundle of Documents (DBOD1);

(f) fifth defendant's Additional Bundle of Documents (DBOD2);

(g) agreed facts between plaintiff and first-fourth defendants (encl 45);

(h) agreed facts between plaintiff and fifth defendants (encl 43); and

(i) issues to be tried (encls 44 and 46).

[8] The order of witnesses for the plaintiff comprising of Orang Asli and plaintiff's experts (SP5 and SP6) was as below:

(a) Long bin Uda (SP1);

(b) Angah bin Itam (SP2);

(c) Amran bin Angah (SP3);

(d) Pam bin Yeek (SP4);

(e) Dr Collin George Nicholas (SP5);

(f) Dr Kamal Solhaimi bin Fadzil (SP6); and

(g) Roslan bin Itam (SP7).

[9] The defendants' witnesses were from the respective government agencies (SD1-SD5), Orang Asli (SD6-SD8), and two witnesses from the timber company namely the *Kepala Hutan* (SD9) and its Managing Director (SD10). The order of witnesses was as follows:

(a) Hairulnizam bin Abd Rahman (SD1);

(b) Rosmawati bt Ibrahim (SD2);

(c) Mohd Hidayat bin Mansor (SD3);

(d) Khairul Nizam bin Mohamed (SD4);

(e) Abdul Aziz bin Sahry (SD5);

(f) Seraitai bin Alang (SD6);

(g) Kasim bin Itam (SD7);

(h) Ali bin Ateh (SD8);

(i) Abdul Afiq bin Abdul Halim (SD9); and

(j) Lim Chee Cheng (SD10).

INTERLOCUTORY APPLICATIONS

[10] Two interlocutory applications were made, namely for discovery of documents (encl 12) and for amendments to the plaintiff's statement of claim (encl 20). The previous learned judicial commissioner dismissed the plaintiff's application in encl 12 without any order as to costs which was for documents pertaining to other logging companies apart from the fifth defendant and to obtain facts pertaining to the plaintiff's historical origins on the land. Meanwhile, I heard and allowed the application in encl 20. This entailed the

other parties' consequential amendments to their pleadings (refer to the Bundle of Pleadings).

FACTS OF THE CASE

[11] The facts of the case were as gathered from the parties' pleadings. The fifth defendant (D5), a licensed timber company, was granted a logging area by the Perak State Government to carry out logging activities under the license AU-01–110–18 for a six months' period from 16 December 2018 until 15 June 2019. On or about 29 April 2019, the plaintiffs had erected a barricade on the access road heading towards the logging area as a sign of protest and to prevent D5 from carrying out the extracted timbers. Time was of essence and therefore, the plaintiffs' actions had disrupted D5's logging activities that had been authorised by the State Government which was to be conducted within a short period of time.

[12] Numerous police reports had been lodged by the plaintiffs and the D5 representatives throughout the protest period regarding the logging areas which the plaintiffs claimed to be their customary rights, and alleged that D5 had trespassed on the land. This claim was vehemently denied by D5 as it claimed that the 80 hectares approved by the State Authority was not owned by the orang Asli since the area belonged to the jurisdiction of Jabatan Perhutanan Negeri Perak. The representatives of D5 had also obtained the permission of the Tok Batins of the villages nearby the logging areas. D5 further denied that the logging activities had caused serious hardships to the plaintiffs or destroyed the land.

[13] The dispute arose because parts of an area of approximately hectares in Kawasan Hutan Simpan Ayer Chepam, Mukim Gerik, Daerah Hulu Perak alleged to be the plaintiff and his tribe's roaming area had been encroached upon by D5's servants and/agents. The plaintiffs contended that the first to fourth defendants (D1–D4) owed fiduciary duties to the plaintiffs as natives to protect, preserve and safeguard the common law rights of the plaintiffs over the land in Kawasan Hutan Simpan Ayer Chepam. Therefore, the plaintiffs contended that D1–D4 had collectively breached their fiduciary duties in allowing D5 to carry out logging activities on the land. The plaintiffs further contended that the defendants had violated their rights as guaranteed under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) adopted by the UN General Assembly on 13 September 2007. The plaintiffs claimed for certain declarations and general, aggravated and exemplary damages to be given to them for the various breaches of their rights and interests.

[14] In their collective defence, D1–D4 averred that the land claimed to be

the *tanah adat* was not located in and had never been *gazetted* by the Pihak Berkuasa Negeri (PBN) as a Kawasan Rizab Orang Asli ('OAR') and neither had there been any demarcation of boundaries in regard to the land, as outlined in an indicative map that was referred to as 'Lampiran B' in the Amended statement of claim. D1–D4 contended that the land was located within Hutan Simpan Kekal Ayer Chepam, Hutan Simpan Kekal Piah and Tanah Kerajaan Mukim Kenering Daerah Hulu Perak. D1–D4 claimed that they had carried out their obligations under the National Land Code ('the NLC'), Enakmen Akta Perhutanan Negara 1984 (Pemakaian) 1985 ('Enakmen Akta Perhutanan'), Aboriginal Peoples Act 1954 (Act 134) and other applicable laws. Therefore, D4 in line with its powers had issued a *Surat Kelulusan Kawasan Membalak Dalam Hutan Simpan Negeri Perak* dated 26 January 2017 and the license AU-01–110–18 was also approved and issued to D5. The area of land (about 80 hectares) that was approved for logging by D5 was in the Kawasan Hutan Simpan Kekal Ayer Chepam which had been *gazetted* for that purpose. Hence, all forest products within or from any permanent forest reserve or State land belonged to the PBN.

[15] According to the amended statement of defence D1–D4, only an area of 5,500 acres within the Mukim Kenering had been *gazetted* through Warta Kerajaan No 94 dated 18 January 1979 and made an OAR known as Kawasan Rizab Orang-orang Asli, Sungai Dala ('Rancangan Pengumpulan Semula Dala'). D1–D4 had been informed via letter dated 7 January 2019 by the Jabatan Kemajuan Orang Asli, Daerah Hulu Perak dan Baling (JAKOA) that Kg Cunex was a splinter village (*kampung serpihan*) that originated from the OAR Kg Sarok, RPS Dala. The plaintiffs had left the OAR and they formed another community at the site known as Kampung Asal Tasik Cunex Hulu Denlak ('Kg Cunex') which the plaintiffs claimed to be the original site of the said village. Therefore, D1–D4 contended that the plaintiffs could not rely on their argument that they had a legitimate expectation on customary rights in respect of the land when it was not the obligation of D1–D4 to *gazette* any land as an OAR since it was at the discretion of the State Government in accordance with needs and consideration of the State Government.

[16] Additionally, the government agency in charge of Orang Asli welfare and needs is JAKOA as such matters fell within the purview of the Federal Government as provided for under art 74(1) of the Federal Constitution read with item 16 of the Federal List in the Ninth Schedule; hence the claims, if any, does not come under the responsibilities of D1–D4.

[17] D1–D4 further averred that D4 had conducted a social impact assessment (SIA) in RPS Dala where servants of D4 had met the community and explained about the State approval for extraction of forest products in Hutan Simpan Kekal Ayer Chepam in general, circulated the Borang Soal

Selidik amongst them and obtained feedback that the community did not have any objection for logging activities to be conducted near RPS Dala. It was also the case for D1–D4 that the logging sites were actually nearer to RPS Dala compared to Kg Cunex.

[18] D5 contended that it cannot be said to have trespassed on the land because the company had obtained a lawful permit and license issued by the Jabatan Perhutanan Negeri Perak (under D4) and the Perak State Government (D1) to enter the land for the purpose of carrying out logging activities. Pursuant thereto, D5 claimed that it had every right to demolish the blockades built by the plaintiffs as the plaintiffs' actions were contrary to the permit granted to D5 from 16 December 2018. The demolition of the blockade was to enable it to bring out the extracted timbers in the short span of time that it had under the concession. Moreover, D5 had built the access road (that was blocked by the plaintiffs), in accordance with the specifications as stated in the Permit Jalan of Pejabat Hutan Daerah Hulu Perak. D5 denied that it had ever oppressed the plaintiffs or acted in contravention of the Federal Constitution and relevant laws.

[19] It was also D5's contention that the dispute was limited only between the plaintiffs and D1–D4 because D5 did not have authority and capacity to determine the status of the said land which duty was upon D1–D4, as provided by the relevant laws, to ensure that the land was free from all encumbrance before it can be alienated, lease, etc to the respective party.

ISSUES TO BE TRIED

[20] There were seven issues altogether to be tried as listed in encls 44 and 46 filed by the plaintiffs against D1–D4 and against D5 separately. However, there were overlaps in those issues and I found that they could be summarised as follows:

(a) whether the plaintiff and Orang Asli represented by him ('the plaintiffs) were entitled to the land and land resources from Kampung Asal Tasik Cunex Hulu Denlak;

(b) whether D1–D4 were tasked with the responsibility to protect the interests of the plaintiffs;

(c) whether D1–D4 had breached the responsibility to protect the interests of the plaintiffs for their failure to *gazette* the Kampung Asal Tasik Cunex Hulu Denlak as an Orang Asli Reserve (OAR);

(d) whether D1–D4 had breached the responsibility to protect the interests of the plaintiffs in respect of their actions that had affected the interests of the plaintiffs and without the plaintiffs' permission;

(e) whether D1–D4's approval granted to D5 had violated the rights and interests of the plaintiffs and breached the laws; A

(f) whether the defendants had trespassed onto and violated the plaintiffs' customary land rights; and

(g) whether the defendants were collectively liable for the plaintiffs' claims in this suit. B

AGREED FACTS

C

[21] Agreed facts with D1–D4 were that:

(a) their responsibilities were as provided for in the NLC;

(b) the protest letter to D1 was dated 26 December 2018;

(c) the plaintiffs received a letter dated 3 April 2019 from Pejabat Daerah dan Tanah Hulu Perak on Notis Pemberitahuan Pembukaan Sekatan Laluan Pembalakan Hutan Simpan Air Chepam, Hulu Perak; D

(d) the notice under s 425 of the NLC was issued by D2 to the plaintiffs; and

(e) a blockade was demolished by D4 and other enforcement agencies on 16 May 2019. E

[22] Agreed facts with D5 were that:

(a) on 29 April 2019 the blockade built by the plaintiffs on the access road to the logging area was demolished; F

(b) on the same day, the plaintiffs rebuilt the blockade to deny D5 access to bring out the logs; and

(c) D5 also demolished the blockades built by the plaintiffs on 17 May 2019, 19 May 2019 and 27 May 2019. G

EVALUATION AND FINDINGS OF THE COURT

[23] Before I proceed, I thank the parties for their well-researched and thorough submissions and case laws cited which had been very useful for the court in understanding the complex issues as hand, in order for it to arrive at a decision to resolve this dispute. The summary of the evidence of the relevant witnesses was mostly accurate and I have also taken the liberty to use parts of their submissions in this grounds of judgment. H I

[24] It is trite law that the plaintiffs bear the burden of proof on a balance of probabilities to prove the tort of breach of fiduciary duties it pleaded against D1–D4 and tort of intentional trespass against D5.

[25] I will now analyse the issues that had been raised by the parties as issues to be tried. Coming back to the seven issues to be tried as outlined above, I found it was 'neater' to recategorise and discuss them under four main headings as follows:

(a) whether the plaintiffs were entitled to the land and forest products from Kampung Asal Tasik Cunex Hulu Denlak area;

(b) whether D1–D4 were tasked with the responsibility to protect the rights and interests of the plaintiffs in respect of the alleged customary land rights;

(c) whether D1–D4 had breached any duties by not *gazetting* the Kampung Asal Tasik Cunex Hulu Denlak as an Orang Asli Reserve (OAR) and allowing D5 to carry on logging activities in the land; and

(d) whether collectively the defendants had trespassed onto and violated the plaintiffs' customary land rights and therefore, liable for the plaintiffs' claims in this suit.

Whether the plaintiffs were entitled to the land and forest products from Kampung Asal Tasik Cunex Hulu Denlak area

Customary land rights under common law

[26] It is settled that common law recognises customary land rights in Malaysia as had been decided by the superior courts in numerous case laws across the country such as:

(a) *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor (No 2)* [1997] 5 MLJ 432; [1998] 2 CLJ 665 (*Adong bin Kuwau*);

(b) *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591 (*Sagong bin Tasi*);

(c) *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 (*Nor Anak Nyawai*);

(d) *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 (*Madeli bin Salleh*);

(e) *Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli & Anor v Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal* [2015] 6 MLJ 527 (*Mohamad bin Nohing*);

(f) *Kong Chee Wai dan satu lagi lwn Pengarah Tanah dan Galian Perak dan lain-lain dan satu kes lagi* [2015] MLJU 121; [2016] 1 CLJ 605 (*Kong Chee Wai*);

(g) *Eddy bin Salim & Ors v Iskandar Regional Development Authority & Ors* [2017] MLJU 2308; [2017] MLRHU 1793 (*Eddy bin Salim*);

(h) *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 (*TR Sandah*); and

(i) *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273; [2022] 3 CLJ 1 (*Busing ak Jali*).

[27] In Peninsula Malaysia, the National Land Code and Aboriginal Peoples Act 1954 (Act 134) ('the APA') have not defined 'tanah adat' nor provided for it in the legislation. Malaysian courts have, over the years developed and established principles for the recognition of the Orang Asli and natives of Sabah and Sarawak land rights. Common law has thus recognised and protected the 'pre-existing' rights of people, including rights pertaining to land ownership which arose from customs. Unless and until they are extinguished by legislative provision or an act of executive government authorised by legislation, the legal rights will continue to exist. The common law rights, to a certain extent, complement the rights that are protected by the APA. If the land rights are to be withdrawn for certain reason such as land acquisition by the State, then the Orang Asli may be paid compensation (in the event that happens) in accordance with the provisions of the relevant laws. Nevertheless, the NLC in s 4(2) does provide that 'Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of — (a) any law for the time being in force relating to customary tenure'.

[28] Based on the principles enunciated in the above cases, it was submitted by the senior federal counsel on behalf of D1-D4 that the plaintiffs must adduce clear evidence of 'pre-existing rights' on the land that they are claiming to be their ancestors' land, and the test to be satisfied are *continuous occupation* and s*ufficient measure of control* against other parties from interfering with or entering the alleged customary land: *Madeli bin Salleh* and *TR Sandah*. Therefore, it is a question of fact and history for the court to determine. The Malaysian courts' decisions on this have been consistent with the decision in *Calder*'s case (*Calder v Attorney-General of British Columbia* [1973] 34 DLR (3d) 145) and *Mabo*'s case (*Mabo and Others v State of Queensland and another* (1986) 64 ALR 1), where it was held the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in

continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.

[29] Pursuant thereto, the plaintiffs must prove that the 'pre-existing rights' on the disputed land have been enjoyed since time immemorial by their ancestors, either before the British occupation in 1875 or the establishment of the Perak Sultanate in 1528. Hence, this entails the court to analyse the history of the Temiar people of the Hulu Denlak area in order to determine the 'boundaries' of their roaming area. The evidence on their history no doubt came from the written and oral testimonies of SP1, SP2, SP3, SP4 and SP7 and these were supported by the evidence of their experts SP5 and SP6 who had provided the literature of the Temiar people's history and their connection to the land. SP6 had adduced his expert report in accordance with O 40A r 3 of the Rules of Court 2012 ('the ROC'). SP6's report in encl 50 was marked as P13. Meanwhile, SP5 had adduced his witness statement, curriculum vitae (CV) in P9, a book authored by SP5 entitled 'Looking Back and Looking Forward' (P10) and a CD containing the video of the Orang Asli life in Kg Cunex in Hulu Denlak as documented by SP5 in collaboration with Google Earth Voyager entitled 'Cunex History of resettlement and Legend the Origin of Cunex' marked as P11. P10 was published by Asia Indigenous Peoples Pact (AIPP) in 2021 and reprinted in 2022, and it was an effort of SP5 with his NGO known as Center for Orang Asli Concerns (COAC). P11 was played in court during the trial on 19 June 2023.

[30] The plaintiffs' witnesses SP1, SP2, SP3, SP4 and SP7 testified that they are Temiar from the ethnic of Sakai/Senoi and speak the Temiar language. Being the oldest at 73 years old then, SP1 told the court the history of his people and their connection to the land. They mainly lived in hill sites and other sites close to the rivers. Later, the plaintiff (SP4), who testified in Bahasa Malaysia told the court that he and his community currently lived at Sg Denlak or known as 'Ong Denlak' where their ancestors lived previously. The name of his village head was Omar bin Lee. The court also heard SP7's testimony regarding the delineation of their traditional territory known to them and neighbouring communities. According to SP7 the information was passed down from generation to generation. SP7 stated:

> 14.S: Bagaimana kamu mengetahui sempadan-sempadan kawasan tanah adat kamu?
>
> J: Kami mengetahui daripada nenek-moyang kami. Pengetahuan nenek-moyang kami diturunkan secara turun temurun kepada kaum kami. Selain itu, Kampung Cunex diliputi dengan warga orang-orang asli Temiar yang lain, yang menjalankan kehidupan mereka secara kelompok masing-masing bersebelahan dengan Kampung Cunex. Maka sempadan-sempadan kawasan tanah ini juga berdasarkan persefahaman diantara kelompok orang asli yang mengunakan bukit, pematang dan sungai sebagai permisahan sempadan.

15.S: Apakah tanda sempadan?

J: Ikut pematang atau Gerbok, ikut gunung-ganang, ikut aliran sungai yang berada di kawasan bersekitaran tersebut.

16.S: Apakah nama gunung-gunung dan sungai tersebut?

J: Gunung Rasik, Gunung Tajam sampai ke Gunung Kayau, Bukit Hererd.

[31] SP2 testified about their history (referring to p 29 of CBOD):

29.S: Boleh ceritakan mengenai sejarah asal usul Cunex?

J: Nenek moyang kami beritahu bahawa matahari mula-mula terbit dari asal Mungkah dan terus berjalan sampai air terjun dekat hulu air Denlak. Matahari mahu berehat di sini sebelum mula bergerak. Tuhan (Aluej) kami kata kepada matahari bahawa matahari tidak boleh berehat di sini sebab jalan kita masih jauh. Apabila mereka sampai dekat air terjun Cunex, matahari duduk bawah, dia berehat dan terus jadi gelap dan menjadi malam. Tuhan kami mengajak matahari, dan berkata matahari tidak boleh duduk di sini selama-lama sebab di sini tempat cucu-cicit nanti. Kalau matahari duduk di sini, nanti tempat jadi sempit dan cucu-cicit tak boleh duduk kalau sempit. Matahari cakap dia nak duduk di sini sebab dia terlalu letih dan tak boleh jalan. Selepas itu, Tuhan kata tak boleh nak duduk dekat air terjun Cunex dan matahari mesti jalan laju sikit. Matahari hari tidak duduk di Cunex. Tuhan cakap kepada matahari bahawa matahari tak boleh duduk dekat dengan air terjun Cunex, sebab cahaya matahari terlalu panas, nanti air kering, tanah kering dan pokok-pokok kering serta jadi malam. Tuhan pun kata dia tak boleh bagi matahari duduk sana, sebab cucu-cicit saya nak duduk sini. Tuhan pun mengajak matahari pergi sampai ke air terjun Minroi. Mereka telah rehat di sana. Matahari duduk satu hari dan Tuhan minta terus berjalan. Lepas itu mereka berjalan ke asal Perendah dan berehat sahaja dan tidak terbenam. Tuhan terus ajak pergi terus ke pusat tasik. Di sini sempadan Teren-Low, hujung matahari dan diselamat oleh Tuhan. Ini adalah sejarah awal terbenam matahari di air terjun Cunex. Tuhan pun tandakan tempat terbenam matahari di batu tanda.

30.S: Kenapa air terjun itu sangat penting?

J: Sebab ini adalah tanda sejarah awal Cunex dan tempat ini menjadi peringatan kepada kami sejak turun temurun untuk generasi kami, cucu dan cicit kami untuk memperingati sejarah Cunex. Aleuj menandakan tempat ini sebagai suci dan kami perlu menjaganya. Ia juga merupakan bekalan air bagi orang-orang Kampung Cunex untuk aktiviti harian.

[32] SP2 in his witness statement gave an account of their livelihood in Kg Cunex for generations and why they had left the OAR in RPS Dala:

11.S: Sejak bilakah suku Kaum Temiar duduk di Kampung Tasik Asal Cunex?

J: Selama bertahun-tahun suku Temiar telah berpindah-randah ke seluruh kawasan hutan ini atas beberapa faktor. Sebelum tahun 1970-an, suku kaum Temiar tinggal di Keled yang terletak di sebelah timur penempatan Kampung Cunex sekarang. Walau bagaimanapun, sebaik sahaja Pemberontakan Komunis (juga dikenali sebagai Kecemasan Kedua, 1968-1989) menghampiri perkampungan kami, pihak

kerajaan pada ketika itu telah cuba mengambil hati komuniti dengan membuka zon pendaratan untuk helikopter dan pos perubatan. Bagaimanapun, kami akhirnya terpaksa berpindah ke Kampung Agam pada tahun 1977. Pada tahun 1981 apabila takungan air Empangan Kenering yang baru dibina mula penuh, suku Temiar dipindahkan semula sebagai sebahagian daripada penempatan semula yang lebih besar yang dipanggil RPS Dala bersama dengan kejiranan masyarakat Orang-orang Asli lain. Sepanjang 30 tahun selepas itu, suku Temiar dari Kampung Cunex telah dipindahkan sebanyak tiga kali dalam skim RPS Dala. Walaupun terdapat beberapa kemudahan infrastruktur dan pertanian moden, suku Temiar tidak dapat menjalankan autonomi kami atau memanfaatkan sepenuhnya kegiatan ekonomi kami. Pada tahun 2011, komuniti Cunex telah kembali ke tanah nenek-moyang kami untuk memulakan semula kehidupan kami. Malangnya tidak lama selepas kami kembali, gajah-gajah telah memusnahkan tanaman getah kami dan kami terpaksa kembali ke RPS Dala pada tahun berikutnya Akhirnya, pada 2016, kami telah dapat kembali semula ke tanah nenek-moyang kami dan melindungi tanah nenek-moyang kami dari penceroboh, pelombong dan pemburu.

12.S: Mengapakah kamu berpindah ke Kampung Agam dari Kampung Keled?

J: Askar-askar Malaya telah mengarahkan kami berpindah kerana darurat pada masa itu.

13.S: Selepas itu mengapa kamu berpindah ke mana?

J: Kampung Paloh.

14.S: Mengapakah pindah ke Kampung Paloh?

J: Cari buah, rotan, gaharu untuk menjana ekonomi kami sendiri.

15.S: Selepas itu kamu berpindah ke mana?

J: RPS Dala.

16.S: Kenapa kamu berpindah sana?

J: Empangan Kenering yang baru dibina oleh kerajaan telah dinaiki air sehingga memusnahkan ladang-ladang dan kubur-kubur kami. Sebab itu, kami dipindahkan bersama-sama orang asli di sekitar ke RPS Dala

17.S: Di RPS Dala macam mana kamu menjana ekonomi?

J: Kami tidak membuat apa-apa lagi.

18.S: Selepas itu mengapa kamu pindah ke Kuala Sarok Lama pada tahun 1986?

J: Terdapat keluarga kami di Kuala Sarok Lama dan juga kerana Tok Batin pada masa itu menyuruh kami pindah ke sana.

19.S: Selepas itu mengapa kamu pindah ke Kampung Sarok Baru?

J: Kuala Sarok Lama telah banjir kerana pencerobohan pembalakan yang berlaku dan kami berpindah ke Kampung Sarok Baru pada tahun 2000.

20.S: Selepas itu kamu menetap berapa lama di Kampung Sarok Baru dan berpindah ke mana lagi?

J: 2000–2011, dalam sekitar 11 tahun dan selepas itu berpindah ke Kampung Cunex.

21.S: Mengapakah kamu pulang ke Kampung Cunex?

J: Kampung Cunex merupakan tempat asal nenek-moyang kami dan identiti keturunan kelompok kami. Sekiranya, tiada campur tangan oleh pihak ketiga, nenek-moyang kami akan menetap di kampung Cunex. Selain itu, Kampung Cunex juga mempunyai beberapa tempat suci serta kenangan nenek-moyang dan identiti kami.

22.S: Selepas itu apa berlaku?

J: Kami telah menanam tanaman dan pokok-pokok getah di sana. Tetapi kami terpaksa berpindah ke Kampung Sarok Baru sebab Gajah memusnahkan tanaman dan pokok-pokok getah kami di kampung asal Cunex kami.

23.S: Selepas itu apa berlaku?

J: Apabila keadaan bertambah baik, kami pindah semula ke Cunex kerana masih sayangkan nenek-moyang kami.

24.S: Mengapa kamu pulang ke Cunex semula selepas itu?

J: Di Cunex juga masih ada anak-anak pokok yang tumbuh semula selepas dimusnahkan gajah.

[33] The cross-examination of the plaintiffs' elderlies by counsel for D1–D4 touched upon the length of time they had lived in Kg Tasek Asal Cunex ie 20 years and their forefathers before them lived in nearby Kg Keled and also Kg Peres. No villagers live in Kg Keled and Kg Peres now (moved away). The distance from Kg Sarok and Kg Cunex was also not far and it wo/uld not take a day to travel between the two places. These villages were claimed to be within their territory of roaming areas. The witnesses also told the court the importance of the *tanah adat* in their lives as otherwise they would not be able to roam for forest products, herbs and 'medicine', hunt and obtain items for their prayers (*bersewang*). It is a well-known fact that the 'Orang Asli identity is dependent on two very fundamental aspects–attachment to a particular territory and a religio-cultural spirituality linked very much to that geographical space' (refer to P10 at p 33). The Temiars (not only from Kg Cunex) attach great importance to the '*batu tanda*' ie the Rock-Where-the Sun-Descended (near the Cunex Waterfall), and the Cunex Waterfall itself, which is located behind Kg Cunex, mark the early history of Cunex as it is a sacred site for their people. They also rely on the waterfall and Sg Denlak as their water source. The other landmarks of great importance to the Temiars of Hulu Denlak is the 'Oldest Durian Tree' planted by their ancestors (marked as their customary territory identity), the 'Keramat Buaya' which is the location where crocodile bones are discovered after a tiger attacked it, the 'batu asah' they use to sharpen their machetes before they proceed into the forest, and a more recent landmark to support their claim is 'Dr Bolton's Landing Zone' and a medical post in Pos Keled. The landing zone is a helicopter landing point used to bring in medical supplies and it was established by the government.

[34] In D5's cross-examination of SP1, the witness replied that he had been living in Kg Tasek Asal Cunex since before 2018. He admitted that despite the logging activities, SP1 still lived in his village, tended to his crops and he could still perform the prayers as usual at the place of worship of their god Aluej. In regard to *adat resam* pertaining to marriage and death were also still carried out by the villagers. SP1 told the court that the oldest Pokok Durian in their roaming area was still there (refer to p 32 of CBOD1). The significance of this tree to the plaintiffs as it was the oldest durian tree there and had been revered since his ancestors' time. He admitted that his livelihood had not been affected by the logging activities. However, SP1 disagreed that the logging areas were 8km away from his village. He also disagreed that the blockade was 2km from the logging areas. The witness said he did not know that D5 had been granted a permit to carry out logging activities or that other villagers nearby such as from Kg Sarok, Kg Untung and Kg Urat did not object to the logging activities by D5. SP1 admitted that he knew SD1 was the Tok Batin of Kg Sarok and that Kg Cunex did not have a Tok Batin.

[35] In re-examination, SP1 clarified his answer that the logging activities did not affect his livelihood. SP1 explained that 'Kampung Tasek Asal Cunex kita setuju ini pembalak sampai dekat atas itu memang kita tak setujulah pasal kita sayang itu jalan tempat air, air kita. Itulah, itu saja'. Therefore, the translator stated 'kalau tak diganggu, dia setuju.'. The Court asked SP1 how far was the logging area from his village and he replied 'Macam ada sebatulah dekat daripada rumah kita'. It would take him about 1 hour to walk to the logging area. In comparison, he would walk about five minutes to the area where he planted his crops. The questions in cross-examination of SP2 and SP3 were similar and the answers were also similar. Thus, I will not repeat the same.

[36] SP2 in cross-examination by D5's counsel agreed that D5's representatives did not use force on the villagers (plaintiffs). SP2 also stated that he disagreed to the suggestion that D5 had come to the village to negotiate with them after the blockade was first built by the plaintiffs. SP3 in the cross-examination by D5's counsel disagreed that the suit was taken by the plaintiffs upon the advice of COAC. However, he agreed that the plaintiffs' objection against the logging activities was made upon the advice of COAC. The Center had also set up a school for the Kg Cunex villagers after they moved from RPS Dala where the children learnt Bahasa Malaysia, English and Bahasa Temiar, unlike the government school which did not teach English and Bahasa Temiar (the witness said 'bahasa Orang Asli tidak diktiraf oleh Kerajaan').

[37] SP3 was also the person who prepared the letter dated 11 October 2018 (P1) to inform JAKOA that the plaintiffs had moved out of RPS Dala to Kg Tasek Asal Cunex, Hulu Air Denlak. He prepared the letter more than a year after the move and explained that the delay was due to the fact that they were

located far away from Gerik. He was taught to use a GPS device supplied by COAC. The device was used by SP3 to input the tracking points on the indicative map of the alleged *tanah adat* that was prepared by COAC. SP3 showed the tracking points that could be seen in the maps that were exhibited in the CBOD2 at pp 24 and 25 marked as P2A and P2B. However, SP3 only knew how to use the device whereas maintenance would be done by COAC. The photographs exhibited by the plaintiffs in pp 29–35 of CBOD1 were taken by SP3 using his handphone but they were printed by COAC. In re-examination, he clarified that the blockades were not put up by COAC and the plaintiffs' themselves were responsible for them since they were unhappy seeing their customary land had been affected by the logging activities.

[38] As stated earlier, the plaintiffs' testimony were supported by their experts' evidence in the form of SP5 (Dr Collin Nicholas) who was the COAC's co-ordinator and from the expert opinion of SP6, an academician with University Malaya. The court heard that SP5 had been called as an expert in many *tanah adat* claims by the Orang Asli, in *Sagong bin Tasi*, *Kong Chee Wai*, *Eddy bin Salim*, amongst others, and his opinion had largely been accepted by the superior courts. In 2018, COAC worked with Google Earth Voyager to produce a video presentation (P11) which had focused on the Kg Cunex story. The short documentary highlighted the history, situation and culture of the plaintiffs' community and *tanah adat*. The documentary also complemented SP5's book (P10) which had a part about the plaintiffs' struggle to obtain recognition in regard to the breakaway Kg Cunex and their reasons for returning to their homeland after leaving the OAR. After 30 years of living in the OAR, despite promises of better access to school and other amenities, some of their communities realised that they were in a worse off situation than before the resettlment. They claimed that there was no autonomy in the 'structured government-managed schemes'. The return to Kg Cunex was 'to recover and revive their traditional institutions and traditional way of life' (p 49 of P10), to protect their sacred sites as well as to exercise their rights under UNDRIP.

[39] SP6 testified about the history of the Temiar people in his expert's affidavit (P13 which contained his CV and Report, particularly in pp 1–7). He had based the Report on documentary research based on previous writings by researchers and commentators on the Temiar Orang Asli, published materials, verbal accounts by the Temiar Orang Asli of Cunex and information provided by SP5. SP6 had also conducted a field visit and interviewed the Temiar Orang Asli of Cunex (p 1 of the Report in P13). SP6 had also drawn on his own experience and expertise having conducted research on Orang Asli and development over the last two decades:

> From information collected during fieldwork where I collected a rough sketch of the kinship/genealogy charts of some of the village elders of the Temiar in Cunex, we were able to trace 5 generations having continuously lived in the area. With the

survey map produced by Noone (1936) and broader documentation from as early as the late 19th century, we can assume the Temiar have occupied the Perak-Kelantan watershed for a period of at least 150 years.

(See para 59 at p 9 of P13)

[40] The court learnt from the literatures referred to in the Report, traditionally the Temiars are distinguished from their Negrito neighbours in that they are not nomadic. They do hunt and collect from the jungle but also are described as shifting cultivators, (Williams-Hunt 1952, Carey 1976) (refer to paras 21–24 at p 3 of P13_. SP6 observed and concluded in para 40 at p 7 of the Report that:

> The current Temiar people living along the Denlak or Dala river are possibly descendants of the Temiar people that Noone (1936) encountered in his expeditions during the mid-20th century. As Pam Bin Yek explains, Temiar customary landscapes are bounded territories agreed upon by their ancestors, the Temiar settlements along the upper reaches of the Denlak (Dala) river in Noone's survey map were most likely the ancestors of today's Temiar in Cunex and Paloh.

[41] 'Noone' refers to HD Noone, a professional anthropologist who was the first British Adviser on Aborigines as well as Director of the Ethnographic Museum in Taiping in the 1930's where the author had published the *Report on the Settlements and Welfare of the Ple-Temiar Senoi of the Perak-Kelantan Watershed* (1936, Perak State Museum). Noone's map is exhibited in P13A.

[42] On the other hand, none of the defendants' witnesses were able to deny that the plaintiffs have any connection to the land. They were mainly harping on the fact that customary land or *tanah adat* was not provided for in the APA or that no *tanah adat* had ever been granted to any Orang Asli in the State. Generally, the government's witnesses (SD1–SD4) testified that there were no crops planted on the land and Kg Cunex was far from the logging sites, and therefore the plaintiffs' claims could not be upheld. Moreover, there were no application from the plaintiffs to *gazette* the land either in respect of Kg Keled, Kg Peres or Kg Cunex. SD1 states that the current policy of the department is that if there is any application to *gazette* any breakaway village such as Kg Cunex, JAKOA Perak and Kedah, it would not process the application (for approval of the relevant authorities until the PBN) because it has to focus on *gazetting* all 258 recognised Orang Asli Villages wherein about half of that number has not been *gazette* yet. In the case of the breakaway Kg Cunex, it is not recognised by JAKOA because the plaintiffs have been resettled at Kg Sarok in RPS Dala where the government has provided them with many facilities therein.

[43] The learned senior federal counsel suggested to SP6 that since the interviews conducted by SP6 were only with the plaintiffs (which total

approximately 128 persons), their views did not represent the views of the whole Temiar people. SP6 replied in the affirmative. Nevertheless, when it was suggested that the outcome of his study was inconclusive, SP6 disagreed because although he spent a night in the village interviewing members of the Temiar in Cunex but he also referred to the literature that existed on Temiar beliefs, religion and culture. SP6 had also referred to the 1936 Noone's map to get an idea of what were written about Temiars from an earlier period. Therefore, the mapping of settlements on Noone's map confirmed what SP4, SP7 and a few other villagers had told him about the Temiars' beliefs, religion and culture and their way of life in the Hulu Denlak (Dala). He explained that in Noone's map, there were marking of settlements that he encountered in the upper, ie in the Hulu of the Dala River. Outside of that, Noone also marked the boundaries for the other Orang Asli groups nearby like the Lanoh and the Jahai. It is noted that Noone's Map (P13A) is a Government Copyright Reserved Map (British Government in Malaya).

[44] The plaintiffs told SP6 that there were villages at the interior of the Dala River. This was affirmed in Noone's older maps, for instance, when the plaintiffs drew the map of their landscape and when SP6 showed them later the map of Noone the plaintiffs were able to confirm the river and talk about how one river entered another river and where that village was. The other things were like movements of the villagers where they were moved to Kg Agam (during the Emergency) and then Kg Sarok (building of Kenering Dam) which later became the RPS Dala. These events could be confirmed through records. SP6 explained that for instance regarding the movement of the Temiars during the Emergency, SP6 looked at other (not necessarily on Cunex) literatures dealing with Orang Asli, during the Emergency, such as a book by Leary in 1995, Richard Noone in 1972, and also Williams-Hunt in 1952 to understand a bit more on the movements. Despite being in RPS Dala (before 2016), they would always return to Cunex to fish in the rivers, collect jungle produce such as rattan and to enjoy seasonal fruits from trees which they and their earlier ancestors had planted (para 29 of P13).

[45] From the evidence of SP6, the court agreed with the findings of the expert where he stated in para 36 at p 6 of the Report that the Temiars may move from one area to an adjacent area to open new agricultural sites, however their movement is limited within their designated customary territory. They have several gardens or fields and settlements in the landscape which included Keled, Peres and Cunex. Their settlements are often along smaller streams and they would not open settlements at 'Luang' ie a ridge where the source of the rivers meet as the risk is that wild animals would go there to drink. They would also not open settlements on hilltops and near Kerung trees as these attract thunder and lightning. Based on their oral interviews, SP6 concluded that the Temiars have been living and roaming their 'designated' customary territories

for at least 150 years as they are very knowledgeable about the jungle, flora and fauna in the area. Their customary territories extend beyond the area where their villages and agriculture plots are located and include forest, riverine and agroforest areas (para 39 at p 7 of the Report).

[46] Since the defendants were unable to dispel these evidence adduced by the plaintiffs, therefore, the court was satisfied that the plaintiffs had proved on a balance of probabilities that they have unique connection to the land that were marked with their sacred places, landmarks and trees. I agreed with plaintiffs' submissions that the historical occupation of the plaintiff over the land was evidently proved by his aboriginal community and expert report. The plaintiffs' oral information pertaining to their forefathers' existence on the land which were passed over the next generation, and in my view had been well-documented by SP5 in P10 and P11, were admissible evidence. Oral histories pertaining to the Aboriginals are admissible evidence as acknowledged by the High Court (affirmed by Court of Appeal) in *Sagong bin Tasi*.

[47] In regard to 'continuous occupation', it was submitted by the defendants that the plaintiffs have not been able to prove that there was no break in their continuous occupation of the land. Counsel for D5 submitted that the plaintiffs were claiming the whole area as per 'Lampiran B' in the statement of claim (based on the indicative map) as their native customary lands. Nevertheless, counsel submitted there was no oral or documentary evidence put forth by the plaintiffs to prove their continuous occupation of whole of the area in Lampiran B. There was no evidence whatsoever adduced that they built a settlement in the logging area or that they had acquired or created native customary rights over the logging area. There was also no evidence by the plaintiffs that their village and settlement in Kampung Tasek Asal Cunex had been disturbed or demolished and or that they were ordered and forced to vacate the said Kampung Tasek Asal Cunex by the defendants.

[48] However, I found that the evidence of the plaintiffs, for example as stated by SP2, have on a balance of probabilities proved that they had been in continuous occupation of the land. And because they agreed that they had never been forced to vacate Kg Tasek Asal Cunex or their dwellings demolished by agents of D5, this proved that the plaintiffs had *sufficient measure of control* against other parties from interfering with their land. When they had to leave their settlement starting from the Communist insurgency in 1977, the plaintiffs had been able to provide explanation on why they had to leave (for various reasons as I have stated earlier). I refer to SP2's evidence:

> 25.S: Sepanjang kamu berpindah dari satu tempat ke tempat lain, adakah kamu telah tinggalkan Kampung Cunex?
>
> J: Tidak, Kami selalu pergi ke Cunex kerana ia merupakan kawasan rayau kami untuk mencari hasil hutan, makanan, berburu, menangkap ikan di sungai, dan

mencari ubat-ubatan, memetik buah dari pokok buah yang ditanam oleh kami dan nenek-moyang kami. Sejak turun temurun kami telah diajar oleh nenek-moyang kami mengenai aktiviti harian kami di Hutan berdekatan dengan Kampung Cunex, maka walaupun kami dipaksa berpindah ke tempat lain, apabila kami dihendaki untuk menjalankan aktiviti pemburuan, pemungutan hasil hutan, penangkapan ikan, penanaman dan lain-lain, kami akan pulang kepada hutan Kampung Cunex yang menjadi kebiasan bagi kami.

26.S: Boleh kamu senaraikan kawasan rayau kamu?

J: Keled, Cunex, Sungai Cebung, Sungai Por, Sungai Pertu, Sungai Umat, Sungai Kajal, Sungai Pres, Sungai Ong Anjing, Sungai Ong Lamung, Sungai Lumar, Sungai Paloh, Sungai Temiling, Sungai Tengah, Sungai Ong Tengah, Sungai Ong Hada, Sungai Ong Lambuk, Sungai Ong Hengrong, Sungai Ong Gampas, Sungai Ong Per'er, Sungai Ong Mengmong, Sungai Ong Mengbong, Sungai Ong Belkon, Sungai Ong Serampah, Sungai Ong Janash, Sungai Ong Lampap, Sungai Ong Sengsha, Sungai Ong Kardup, Sungai Ong Lanar, Sungai Ong Beralak dan banyak lagi.

27.S: Apa yang kamu lakukan di kawasan-kawasan rayau kamu?

J: Memburu binatang seperti biawak, landak, rusa, monyet dan lain-lain binatang. Kami juga selalu pergi demdep (tidur hutan) di kawasan-kawasan rayau kami juga.

[49] In the case of *TR Sandah*, in referring to *Madeli bin Salleh*, the Federal Court held:

[61] It was on the above facts and evidence that the Federal Court ruled in favour of the plaintiff. It was on that set of facts that the Federal Court decided *that in construing the meaning of 'occupation', actual possession is not necessary and there can be occupation without presence on the land provided there exist sufficient measure of control to prevent strangers from interfering.* The fact that the plaintiff had ceased to live on the land prior to the fire which gutted the house on the land in 1941 did not mean he had ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. (Emphasis added.)

[50] I refer to *Sagong bin Tasi* where the Court of Appeal affirmed the High Court's decision to grant recognition to the aboriginal people's rights on their customary land. The Court of Appeal stated:

[25] There is therefore no doubt in my mind that the 1954 Act [Aborigines Peoples Act 1954] calls for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them. And it is with that approach in mind that I now examine the relevant provisions of the 1954 Act. These now follow. I must add that I have placed emphasis on particular words appearing in the provisions which in my judgment are of importance to this case.

...

[34] So too here. The evidence led in the court below and the findings of fact made by the learned judge which are unchallenged before us leave no room for doubt that

A the plaintiffs had ownership of the lands in question under a customary community title of a permanent nature. Therefore, it is my considered judgment that the learned judge did not fall into any error when he held that the plaintiffs had customary community title to the land in question. I would accordingly affirm his judgment on this point.

B

[51] Applying the principles in these cases to the facts of the present case, *this court makes a finding of fact that the plaintiffs have customary community title to the land by virtue of their continuous occupation of the land since time immemorial, from the time of their ancestors.* However, regard must also be had C to the views of our appellate court judges that there must be some demarcation of the land as they cannot claim ALL areas that they had been planting, foraging and hunting in the past. Referring again to the case of *TR Sandah*, the Federal Court held:

D [67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. *Our position is consistent with the principle as propounded in the case of Nor Anak Nyawai wherein it was held that the native customary rights claim over land founded upon the concept of continuous* E *occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of food, jungle produce etc.* (Emphasis added.)

[52] This court is bound by the recent decisions of the Federal Court and the Court of Appeal which have been consistent on this issue and therefore, I F agreed with the defendants' submissions that the correct position of law regarding the size and boundary of the customary land which may be claimed by the Orang Asli is confined and limited only to the area that forms their settlement but not to the jungle at large where they used to roam and to forage for their livelihood in accordance with their custom and tradition: *TR Sandah*, G *Busing ak Jali*, *Sagong bin Tasi*, *Nor Anak Nyawai*. Having considered all the above facts and authorities, *the court therefore answered 'Yes' to the first issue on whether the plaintiffs were entitled to the land and forest products from Kampung Asal Tasik Cunex Hulu Denlak area.*

H **[53]** Before I move on to the next issue, I have to deal briefly with the issue of the defendant's dissatisfaction with the translation done for a few of the plaintiffs' witnesses ie SP1 and SP2 who testified in the Temiar language which was translated into Bahasa Malaysia by the plaintiff's daughter by the name of Zaleha (who was not a witness in this trial). There were concerns raised by the I defendants, naturally, on Zaleha's credibility (and neutrality) as a translator by virtue of her relationship with the plaintiff. However, none of the parties had provided a translator from JAKOA, who would be the best person to act as translator for this case. Prior to Zaleha taking the oath to act as a translator, plaintiffs' counsel informed the Court that she would help with translating

some words that the witnesses may not be familiar. Later, it was obvious that the older witnesses totally relied on Zaleha to translate the questions and then the answers supplied by the witnesses.

[54] From my observation, Zaleha was not a totally impartial individual because at times, she took a very long time to translate a simple answer required of a witness and then conversing with the witness before giving the answer to the Court, such that it gave me the impression that she was trying to give the 'right answer' to the witness. Regardless, I was satisfied that the plaintiffs' witnesses were witnesses of truth and had given their answers in plain language in the respective witness statements and in the cross-examination, for instance, they admitted that the Act 134 did not state anything about *tanah adat* and that there were no *tanah adat* recognised by the government in the State of Perak. That would have that been a total lie if they were to answer that Act 134 defined and conferred upon them *tanah adat*. Their belief was that they had customary land rights recognised under the common law. In regard to the defendants' submissions that the plaintiffs' witnesses were all interested parties, I could say the same of some of the defendants' witnesses, from my observation of their demeanour and answer in court. It all boils down to the court's duty to make an unbiased assessment of all the witnesses.

Whether D1–D4 were tasked with the responsibility to protect the rights and interests of the plaintiffs in respect of the alleged customary land rights

[55] In 1961, the then Department of Information (Ministry of Interior) published a 'Statement of Policy regarding the administration of aborigine people of the federation of Malaya'. 'This document reaffirms the new government's intention to continue to protect and recognise Orang Asli rights. The document stipulated 'the aborigine being one of the ethnic minorities of the Federation must be allowed on an equal footing from the rights and opportunities which the law grants to other sections of the community'. It was also stated that the goal is '[the] ultimate integration [of the Orang Asli] with the Malay section of the community', but *'special measures should be adopted for the protection of the institution, customs, mode of life, persons, property and labour of the aborigine people*' (Department of Information, 1961: 3, 5).'. I have cited this paragraph which is taken from an article written by R Idrus of the Institute of Southeast Asian Studies, Singapore titled 'The Discourse of Protection and the Orang Asli in Malaysia' published in Kajian Malaysia, Vol 29, Supp 1, 2011, 53–74 (Penerbit Universiti Sains Malaysia, 2011). As far as this court is aware, this Statement of Policy has not been withdrawn. The policy states that the aborigines' way of life, customs, traditions and mode of life should be accepted and recognised.

[56] Prior to this Statement of Policy, the Federal Government had enacted

the APA in 1954 (revised 1974) which was modeled after the Perak Aboriginal Tribes Enactment 1939. The long title of the APA provides 'An Act to provide for the protection, well-being and advancement for the aboriginal peoples of West Malaysia'. R Idrus at p 12 of her article summarised the main provisions of the APA as follows:

> The Act (and the original Perak Enactment) includes provisions for the creation of Aboriginal Areas and Aboriginal Reserves. The Aboriginal Areas were created to accommodate mobile aborigines, whereas the Reserves were created for settled aborigines (British Archives, 1939). The provision also stipulates that an Aboriginal Area or Reserve cannot be converted into a Malay Reserve or a wildlife reserve. All matters dealing with the land (e.g., commercial dealings) in the Area or Reserves require the permission of the Commissioner; the Orang Asli cannot be involved in any land dealings (transfer, mortgage, lease or sale) without the permission of the Commissioner. Here, the power of the Commissioner is further reinforced because he is able to grant permission for commercial dealings (for example, logging) to outsiders. It is important to note that the State has full authority over these areas and can at any time revoke the status of the land. Although this provision was created with the view of protecting the Orang Asli's way of life, the Orang Asli have no authority over the land they inhabit and are subject to the discretion of the Commissioner or the State Authority. At best, as set out in Section 8, 'Rights of Occupancy', the Orang Asli are tenants at will in these designated areas: 'Rights of Occupancy ... shall be deemed not to confer on any person any better title than that of a tenant at will'.

[57] The plaintiffs are deemed to be tenants at will. But D1–D4, particularly PSD2 and PSD3 testified that the departments did not have statutory duty or fiduciary duty to protect the interests of the plaintiffs by *gazetting* the land as an OAR. According to the witnesses, the land being claimed by the plaintiffs had never been *gazetted* as an OAR and were located in the Hutan Simpanan Kekal Ayer Chepam, Hutan Simpanan Kekal Piah and Tanah Kerajaan Mukim Kenering, Daerah Hulu Perak. Hence, the logging activities permitted by D4 was not illegal or never encroached upon the rights of the plaintiffs, if any. In my observation, these government servants should have been more aware of the customary land rights of the Orang Asli as there have been many cases decided by the courts according them such rights.

[58] I noted that the law provides that at the state level, the power to control land and natural resources are entrusted to the respective PBN. One of these duties is to declare areas to be occupied by the Orang Asli to the exclusion of others (upon application by JAKOA). Additionally, in Peninsular Malaysia, the National Forestry Act 1984('the NFA'), the National Land Code ('the NLC'), the National Parks Act 1980 ('the NPA') and Malay reservation legislation for each of the states govern the areas of land, forestry, wildlife and protected areas, respectively. Among the provisions of these laws are for the reservation of land for different purposes, such as gaming reserve, environmental conservation,

reserve for the protection of the Malays, and other reserves. Section 10(1) of the APA specifically provides that the Orang Asli may continue to live within the reservation regardless of contrary provisions in the relevant legislation. The law states:

> 10(1) An aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve under any written law may, notwithstanding anything to the contrary contained in that written law, continue to reside therein upon such conditions as the State Authority may by rules prescribe.
>
> (2) Any rules made under this section may expressly provide that all or any of the provisions of such written law shall not have effect in respect of such aboriginal community or that any such written law shall be modified in their application to such manner as shall be specified.

[59] This provision is a 'red-flag' of sorts that should indicate to the government agencies such as D1–D4 that the Orang Asli have a right to remain in such reserves, although these are not Orang Asli Reserves. With that provision in mind, this court opines that the Orang Asli who remain in the reserves naturally would have a legitimate expectation to have their way of life, customs, traditions and mode of life to be accepted and recognised by the State and its agencies. D1–D4 contended that they do not owe any statutory or fiduciary duty towards the plaintiffs. Moreover, JAKOA had not been named in this suit, which is the rightful agency tasked with handling the affairs of the Orang Asli. It was not disputed that the 2 *Hutan Simpan* abovementioned are *gazetted* as forest reserves. Forest reserves may not be created within aboriginal reserves, as provided for under s 7(2)(iii) of APA. One the one hand, the plaintiffs by virtue of s 10(1) of APA are entitled to remain in the forest reserves but on the other hand, the defendants contended that the plaintiffs could not stake a claim to the forest reserves because these two were not Orang Asli Reserves. D1-D4's submissions in paras 23–24, in my view do not hold water because the defendants failed to understand that the Orang Asli, including the plaintiffs are allowed to remain and carry on with their way of life in the forest reserves although these were not Orang Asli Reserves by virtue of s 10(1) of the APA.

[60] The plaintiffs citing *Mohamad bin Nohing*, submitted that the *gazettemen*t of the forest reserves did not distinguish the customary land rights of the plaintiffs. I agree with the submissions, in light of s 10(1) of the APA and s 4 of the NLC. However, more importantly is the question of *whether D1–D4 were tasked with the responsibility to protect the rights and interests of the plaintiffs in respect of the alleged customary land rights.* From the statutory laws, read with the common law provision, I would also answer 'Yes' to the second question for the reasons stated below.

[61] I refer to the Court of Appeal decision in *Sagong bin Tasi* where it was

held that the High Court had correctly held the first to fourth defendants to have fiduciary duty towards the plaintiff and had breached the duty. The Court of Appeal stated:

> [51] There is nothing startling in the trial judge holding the first and fourth defendants to be fiduciaries in public law. In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power — the public body — may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. *It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other tunes it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest.* But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty. (Emphasis added.)

[62] The plaintiff also submitted at p 20 of their submissions that to further fortify their point, the plaintiff refers to the *Kong Chee Wai*'s case whereby Court of Appeal held the Perak State had a fiduciary duty towards the Aboriginals and the Perak State shall be responsible to *gazette* the customary land in favour of the Aboriginals. In addition, the alienation of customary land which given by Perak State to third party shall be void. However, the written judgment of the said Court of Appeal decision was not available: *Public Prosecutor v Kenneth Fook Mun Lee (No 1)* [2002] 2 MLJ 563; [2001] 3 MLRH 798. I am of the view that *Kong Chee Wai* is an old case and the facts are peculiar to that case alone (where recognition had been given for the settlement of Orang Semai at Kuala Senta. But upon application by JAKOA to *gazette* the land, it did not receive any response from the State Authority for almost ten years).

[63] The latest cases upheld the position that their customary and ancestral land was limited only to the area that forms their settlement but not to the jungle at large where they used to roam and to forage for their livelihood in accordance with their custom and tradition. Otherwise, the goalpost will keep on changing and it would be difficult for the authorities to mark the boundaries and *gazette* them. In my view, it will keep changing everytime the plaintiff turns and even everyday. It does not make sense, so there must be a limit, which the Federal Court has ruled where does the limit end.

Whether D1–D4 had breached any duties by not gazetting the Kampung Asal Tasik Cunex Hulu Denlak as an OAR and allowing D5 to carry on logging activities in the land

[64] In *Goh Bak Ming v Yeoh Eng Kong and other appeals* [2018] MLJU

1133; [2019] 1 CLJ 461 the Court of Appeal stated:

> [33] It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence ...

[65] The court heard submissions that D1–D4 had carried out its responsibilities by *gazetting* RPS Dala on 18 January 1979 via Warta Kerajaan No 94 and had taken into consideration the Orang Asli's needs in that process. However, it was the plaintiffs' own free will to leave the settlement and establish their new homes in Kg Cunex since they were dissatisfied with the small area and condition in the OAR.

[66] SD1 and SD2 had explained the steps to be taken when an application for *gazetting* of an area is received from the Orang Asli. Based on the evidence of SD1 and SD2, the court found that there was no formal application made by the plaintiffs to JAKOA after they moved to re-settled in Kg Cunex for the village to be *gazetted* as an OAR. SD1 in his evidence told the court that the RPS Dala was equipped with modern conveniences such as a school, houses, electricity, clean water supply, tarred road and others, depending on their needs from time to time. The SFC submitted that there could not be any legitimate expectation on the plaintiffs as the State had not *gazetted* the alleged customary land: *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] supp MLJ 293; [2011] 4 CLJ 729.

[67] It was the court's finding that D1–D4 had not breached their fiduciary duties for not *gazetting* the yet to be *gazetted* land at the material time when the approval for D5 to carry out logging activities was granted in 2017. Here, the State Authority had already allocated a parcel of land and gazetted it as an OAR when RPS Dala was established. Moreover, the plaintiffs had moved to another settlement which was not very far from RPS Dala. If there had been an application made by the plaintiffs, it would have been a different consideration by the court. SP3 stated that he informed JAKOA about the move via letter dated 11 October 2018 although they had allegedly left RPS Dala in 2016. This meant that JAKOA was only notified in 2018 whereas the application for a logging approval was done in late 2016 and approved in January 2017.

[68] The court noted the Court of Appeal decision in *Sagong bin Tasi* that held the High Court had erred when it did not award any compensation for that breach of fiduciary despite finding in favour of the plaintiff. The Court of

Appeal held:

> [58] I have given this part of the case anxious consideration and have arrived at the conclusion that the learned judge erred in not holding against the first defendant in respect of the ungazetted portion of the land. In my judgment after having correctly held: (i) that the plaintiffs' customary communal title attached itself to the first defendant's radical title; and (ii) that the first and fourth defendants were under a fiduciary duty 'to protect the welfare of the aborigines including their land rights. the trial judge ought to have included the ungazetted area in question for purposes of compensating those settled there for the deprivation of their property rights.
>
> [59] In my judgment, it was open to the judge to have made a finding that the failure or neglect of the first defendant to gazette the area in question also amounted to a breach of fiduciary duty. Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area. It was aware that so long as that area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable First Peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of nongazettation which is their fault in the first place. I am yet to see a clearer case of a party taking advantage of its own wrong. For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the ungazetted area which is more clearly demarcated in the plan exh P1 and marked in green and yellow. The strip of land that was excised out of the whole area runs across the portions marked green and yellow as well as the gazetted portion marked in orange. It is the former area in respect of which compensation must be paid in accordance with the 1960 Act. This part of the cross appeal must therefore be allowed.

[69] With respect, the facts of the present case can be differentiated from the facts in *Sagong bin Tasi* where the plaintiffs were aboriginal peoples of the Temuan tribe, who by their custom and tradition, were settled peoples, in Bukit Tampoi ('the land'). The first defendant was the State Government of Selangor. The second defendant was a public limited company in the business of road construction. The third defendant was the Malaysian Highway Authority. Part of the land settled upon by the plaintiffs was gazetted as Aboriginal land under the Aborigines Peoples Act 1954 ('the 1954 Act'). A large strip across all this land was excised for the purpose of an expressway which the second defendant was to construct. The first defendant acquired the land and the defendants evicted the plaintiffs from the land. The High Court granted the plaintiffs compensation under the Land Acquisition Act 1960 ('the 1960 Act') for loss of part of land which the judge found to have been held

under customary title. The defendants then appealed.

[70] Therefore, in respect of the third question of *whether D1–D4 had breached any duties by not gazetting the Kampung Asal Tasik Cunex Hulu Denlak as an OAR and allowing D5 to carry on logging activities in the land*, the court answered the question in the negative.

Whether collectively the defendants had trespassed onto and violated the plaintiffs' customary land rights and therefore, liable for the plaintiffs' claims in this suit

[71] The D5 witnesses (PSD6, PSD7 and PS8) testified that they had been notified about the permit to carry out logging activities granted to D5. They met PSD9 and the company's representatives and gave an their 'consent' for the logging activities to be carried out and that their water source close to RPS Dala was not affected by the logging activities of the timber company. PSD9 is an important witness for the timber company (D5) as he acted as liaison between the company, the villagers and the authorities. He had explained the contour maps that were exhibited in the defendant's Bundle of Documents (DBOD2) and showed to the court that the area claimed by the plaintiffs did not come within the logging area. In fact their settlement was about 8km away, according to PSD9 (refer p 113 of DBOD2). Despite the extensive cross-examination on this witness, I found that he was an experienced Kepala Hutan and his evidence given were factual.

[72] Based on evidence from the witnesses, the Court found that the distance between Kg Cunex to Kg Sarok was about 5kms. The distance between the blockade to the logging area was approximately 8kms whereas the distance of the blockade to Kg Cunex was about 2kms. The nearest villages to the logging area Kampung were Kg Sarok, Kg Sg Untung dan Kg Sg Urat. However, as the plaintiffs' witnesses themselves admitted that they were able to go about their lives during the six months when D5 was extracting timber in the approved area, on a balance of probabilities I found it was less probable that the plaintiffs suffered severa hardship due to the logging activities permitted to D5 by D4. As the logging activities had finished by the time the suit was registered, the court found that the situation was back to status quo for the plaintiffs and I did not find it necessary to grant any injunction whether temporary or pemanent to them as they had prayed for.

[73] The court noted further in *Sagong bin Tasi*, that the compensation awarded to the plaintiff in that case was to the settled areas of the land acquired by the defendants for the expressway project and not extended to the areas where the plaintiff roam, forage and hunt or fish. In the present case, the plaintiffs were not evicted or their houses demolished. There was no evidence that they were harassed by D5's representatives. It appeared that they were able

to hold their own during the stand off with the representatives of D5. They were still able to practice their beliefs, tradition and custom and to continue cultivating their land in Kampung Tasik Asal Cunex as usual. In these circumstances, D5 submitted that it cannot be said to have trespassed on the plaintiffs' land in Kampung Tasik Asal Cunex. I have to agree with this submission.

[74] Another point to note is the plaintiffs' contention that the court should consider the 'flawed' licence granted to D5 in (exh D9) which it asserted did not comply with the law because the approver was not the State of Perak but the Jabatan Perhutanan. Having perused the numerous documents exhibited by D5 in respect of its application for a licence to extract timber therein, I did not find anything irregular about the licence. There was evidence by SD4 that a logging licence was issued by the authority tasked with this process ie D4 and not the State of Perak. The court also found that the granting of the licence did not mean that the State also gave D5 proprietary rights as owner of the 80 hectares of land. There was also evidence from the defendants' witnesses that they would ensure no overlaps of areas with existing settlements. If there were any overlaps discovered during the SIA, the logging activities would be aborted in the affected area.

[75] Having considered the evidence on both sides in regard to this issue, I concluded that there was no trespass committed by D5 or any of the other defendants as the facts did not support it, despite the court finding that the plaintiffs had customary rights on the land. Moreover, the logging sites where D5 worked to extract the timber were 8 kms away from the plaintiffs' settlement. Hence, the court moulded the reliefs to ensure that the orders were reflective of the situation, as had been determined after a full trial. The court did not allow the declarations sought because the situation did not warrant it.

CONCLUSIONS

[76] Premised on the above considerations, on a balance of probabilities, the court found that the plaintiffs have proved part of their claims in regard to the customary land. The court did not make any order as to costs.

Order accordingly.

Reported by Muhamad Azham Marwan